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No. 414

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

CATHERINE S. WEINSTEIN, Administratrix of the Estate of ALBERT WEINSTEIN, DECEASED,
Appellant in Appeal No. 12042.

vs.

UNITED STATES,
Appellee.

JOSEPH J. ALESSANDRINE,
Appellant in Appeal No. 12043,

vs.

UNITED STATES,
Appellee.

APPEALS FROM THE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[redacted] Appendix for Appellants

VINIKOOR AND CRIDEN,
505 Finance Building,
Philadelphia 2, Pennsylvania,
Attorneys for Appellants.

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DOCKET ENTRIES IN APPEAL NO. 12042.

(Catherine S. Weinstein, Admx., Appellant.)

1955

August 18 Complaint filed.

August 18 Summons executed.

September 1 Summons returned "on 8-23-55 served" and filed.

September 1 Amended complaint filed.

October 13 Defendant's Notice of taking Depositions of Catherine S. Weinstein filed.

October 24 Defendant's motion to dismiss, etc. filed.

1956

May 8 Plaintiff's Motion for Production of Documents filed.

June 4 Argued sur motion to dismiss.

June 11 Order of Court granting Motion to Dismiss filed.
Noted and Mailed 6-12-56.

June 21 Plaintiff's Motion to Vacate and Set Aside Judgment or Dismissal or in the Alternative request for Conclusions of Law, filed.

July 20 Order of Court denying Motion to Vacate and Set Aside Judgment filed.
Noted and Notice mailed 7-23-56.

August 1 Plaintiff's Notice of Appeal filed 8-2-56. Copy to W. White, Esq.

August 1 Clerk's copy of notice to U. S. Court of Appeals filed.

DOCKET ENTRIES IN APPEAL NO. 12043.

(Joseph J. Alessandrine, Appellant.)

1955

September 1 Complaint filed.

September 1 Summons executed.

September 22 Summons returned "On 9-2-55 served United States Attorney" and "On 9-14-55 served by Registered Mail on Attorney General" and filed.

October 14 Defendant's Notice of Taking Depositions of Plaintiff filed.

October 24 Defendant's Motion to Dismiss, etc. filed.

1956

May 8 Plaintiff's Motion for Production of Documents filed (See C. A. #19433).

June 4 Argued sur motion to dismiss, etc. CAV.

June 11 Order of Court granting Motion to Dismiss file (#19433):

Noted and notice mailed 6-12-56).

June 21 Plaintiff's Motion to Vacate and Set Aside Judgment of Dismissal or in the Alternative Request for Conclusions of Law, filed (See #19433).

July 20 Order of Court Denying Motion to Vacate and Set Aside Order dismissing Complaint filed.

Noted and notice mailed 7-23-56.

August 1 Plaintiff's Notice of Appeal filed (Copy to W. White) 8-2-56.

August 1 Clerk's copy of Notice to U. S. Court of Appeals filed.

August 22 Record transmitted to U. S. Court of Appeals.

AMENDED COMPLAINT.

1. Jurisdiction is laid under the act of the 79th Congress, Second Sessions, Page 753, Title IV, 60 Stat. 843 et seq., 28 U. S. C. 1346 (b) et seq., as amended, known as the "Federal Tort Claims Act."

2. Plaintiff is the personal representative of ALBERT WEINSTEIN of 419 Randolph Street, Camden, New Jersey, and was duly appointed Administratrix of his estate on August 12, 1955 in Camden County Surrogate's Court, State of New Jersey.

3. Plaintiff is the widow and mother of decedent's two children, Claire Ann Weinstein and Jeanne Helene Weinstein, aged eight and four respectively.

4. ALBERT WEINSTEIN died as a result of injuries resulting from the "Publicker Explosion" occurring and resulting on May 26-27, 1955, in Philadelphia, Pennsylvania, beginning with the fire and explosion in Building #160 at Delaware Avenue and Bigler Streets, all of which was proximately caused and brought about by the negligence and wrongful acts and conduct both of omission and commission on the part of the Defendant, its agents, servants, employees, operators, and other personnel acting within the scope of their employment, under circumstances where the United States, if a private person, would be liable under the law of the place where such wrongful acts and omissions occurred. Plaintiff charges a large number of Defendant's negligent and wrongful acts and omissions as hereinafter more particularly set forth, continued, occurred, singly and in sequence within the Eastern District of Pennsylvania.

5. Prior to and including May 26-27, 1955, Defendant, by and through its employees, coming within the scope of their employment, supervised and controlled the building known as #160 and caused said building to be locked daily for a period commencing four thirty o'clock P. M. and eight o'clock A. M. of each day, during which time operations in the plant were prohibited.

6. Plaintiff alleges that the Defendant knew or should have known by the exercise of reasonable diligence that the prohibited hours of operation and locked building enforced by the Defendant without proper precautions, warning and regulations, created a highly dangerous condition, i. e. a large accumulation of fumes, vapors, the quality and characteristics of which the Defendant knew or should have known by the exercise of reasonable diligence to be highly and inherently dangerous to persons working in or about the building.

7. The Plaintiff alleges that the Defendant was negligent in failing to take proper precautions for the protection of employees working in and about Building #160.

8. Notwithstanding its special knowledge of the condition created by the prohibited hours of operation and locked building, the Government failed to:

a. Require and promulgate orders and regulations relating to proper ventilation, air space and air circulation.

b. Post watchman and guards for the safety of persons employed in or about Building #160.

c. Exercise that degree of care commensurate with the risk of danger arising from and reasonably to be expected to arise from the large accumulation of vapors of a highly and inherently dangerous inflammable nature which were contained in a congested area amidst chemicals rea-

sonably to be expected to be found in an alcohol denaturing plant and bonded warehouse.

d. To issue specific and direct detailed instructions to its employees relating to safety.

9. Defendant wrongfully failed to require under its regulatory powers that this highly dangerous and hazardous building be so maintained as to secure the highest degree of ventilation, air space and air circulation.

10. Plaintiff notifies Defendant that she will not be confined to the specific negligence and wrongful acts and omissions hereinbefore specified but expects to rely additionally and independently upon the general allegations of wrong, fault, negligence, tortious acts and conduct of the Defendant.

FIRST CAUSE OF ACTION.

All of the allegations of the foregoing paragraphs herein are incorporated by reference as if the same were set forth at length.

11. At the time of the aforesaid accident, Plaintiff's decedent was in good and robust health with prospective advancement and substantial earning capacity.

12. The Decedent left surviving him a wife, CATHERINE S. WEINSTEIN of 619 Randolph Street, Camden, New Jersey, and two children, CLAIRE ANN WEINSTEIN and JEANNE HELENE WEINSTEIN of 619 Randolph Street, Camden, New Jersey, as the only persons entitled to recover damages for his death and on whose behalf this action is brought.

13. By reason of the death of decedent, the Plaintiff has suffered pecuniary loss and has incurred various expenses for funeral and burial.

14. The decedent did not bring an action for his personal injuries during his lifetime, and no other action for the death of the decedent has been commenced against this Defendant, nor has any claim been made against any other governmental agency.

15. By reason of his untimely death, decedent's next of kin were deprived of the support and comfort which they would have received but for the fatal injury, and more particularly the Act of 1855, P. L. 309, as amended, and Pennsylvania Rule of Civil Procedure, No. 2202(a).

WHEREFORE, Plaintiff claims the sum of One Hundred Fifty Thousand ($150,000.00) Dollars as damages upon the said cause of action.

SECOND CAUSE OF ACTION.

All of the allegations of the foregoing paragraphs herein are incorporated by reference as if the same were set forth at length.

16. By reason of the negligence of the Defendant as aforesaid, and the death of ALBERT WEINSTEIN, as herein above described, Plaintiff claims the benefit of the survival statutes of this Commonwealth including the Fiduciaries Act of 1949, P. L. 512, Article VI, Second 601, et seq., and seeks on behalf of his estate the economic value of decedent's life during his life expectancy and the pecuniary loss sustained by his estate.

17. By reason of the untimely death of the said, ALBERT WEINSTEIN, Plaintiff claims, in addition, damages for the psychic value of the expectancy of the life of the decedent which was cut short by reason of the above-described accident.

WHEREFORE, Plaintiff claims of Defendant on behalf of the estate of ALBERT WEINSTEIN, the sum of One Hundred Thousand ($100,000.00) Dollars.

/s/ MARTIN VINIKOOR,
VINIKOOR and CRIDEN,
Attorneys for Plaintiff.
By: MARTIN VINIKOOR.

GOVERNMENT'S MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION FOR A MORE SPECIFIC PLEADING.

The Government moves to dismiss the Amended Complaint for the following reasons:

1. The Amended Complaint fails to state a claim against defendant upon which relief can be granted.

2. Case is barred by:

(a) 28 U. S. C. 2680(a);
(b) 28 U. S. C. 2680(c); and
(c) 28 U. S. C. 2680(i).

3. The case must be stricken for the reason that if the United States was a private party it would not be liable.

4. The Government owed no duty (of omission or commission) to the plaintiff or plaintiff's decedent.

5. Plaintiff's decedent assumed the risk and was guilty of contributory negligence.

6. If an negligence existed it was on the part of the Publicker Industries, Inc.

7. The building and/or buildings were under the exclusive control of Publicker Industries, Inc. Plaintiff's decedent was a Publicker employee and, accordingly, entitled to Pennsylvania Workmen's Compensation, precluding recovery under the Federal Tort Claims Act.

8. Plaintiff's Amended Complaint alleges a liability on the ground of "respondeat superior" and yet fatally fails to name the Government agent and/or agents who were negligent.

9. The Court lacks jurisdiction.

In the alternative, the Government moves for a more specific pleading, particularly with reference to paragraphs 8, 10 and 17 of the Amended Complaint.

/s/ W. WILSON WHITE,
United States Attorney.
/s/ G. CLINTON FOGWELL, JR.,
Assistant United States Attorney.

Dated: 10-21-55.

[PLAINTIFFS'] MOTION FOR PRODUCTION UNDER RULE 34.

AND NOW, MAY 8th, 1956, come the Plaintiffs by their Attorney, and move the Court for order under Rule 34, requiring the Defendant to permit the inspection, copying or photostating of the following papers and documents, permission for same having been refused by Defendant:

1. The plat and plans of the premises, building, apparatus and equipment located at Delaware Avenue and Bigler Streets, known as Building #160, Bonded warehouse and Denaturing plant.

2. Reports of the Alcohol Tax Unit of the Federal Bureau of Internal Revenue and/or Publicker Industries, Inc., relating to inspections, report of explosion, etc., including:

a. Form Nos. 1443, 1466f, 1468a-f, 1474, 1476, 1479, 1481 and 1489 for the years 1953, 1954 and 1955.

b. Any claims for remission of tax for losses occurring on the premises relating to the explosion occurring on May 26, 1955 (Forms 1443a, 1443b, 1468a to 1468f inclusive, and 1482).

c. Report of Storekeeper-gauger with respect to such losses as required by 26 C. F. R. 182.700D, and 182.778.

d. Any reports by Assistant Regional Commissioner of the Alcohol Tax Unit as required by 26 C. F. R. 182.700E and 182.778.

e. All inspectors' records for the years 1953, 1954 and 1955, with specific reference to any notice with respect to the condition of the accumulation of fumes in Building #160.

f. Any correspondence between Federal Storekeeper-gaugers, Inspectors, Assistant Regional Commissioners, Regional Commissioners, and Director Alcohol Tax Division and/or Publicker Industries, Inc. with respect to ventilation and the accumulation of fumes in Building #160.

This motion is based upon affidavit hereto attached.

/s/ MARTIN VINIKOOR,
VINIKOOR and CRIDEN,
Attorneys for Plaintiffs.
By: MARTIN VINIKOOR.

Commonwealth of Pennsylvania }
City and County of Philadelphia } ss.

MARTIN VINIKOOR, being duly sworn according to law, deposes and says that he is Of Counsel for the Plaintiffs in the above matter; that Defendant has in its possession the papers and documents requested in the accompanied motion; that the Defendant through its Counsel refused to permit the Plaintiffs to inspect or copy the same and that the above-mentioned items constitute or contain evidence relevant to a matter involved in this action.

/s/ MARTIN VINIKOOR.

Sworn to and subscribed before me this 8 day of May, A. D. 1956.

/s/ GOLDIE LEVIN.

Order Granting Motion to Dismiss
Plaintiffs' Motion to Vacate and Set Aside Judgment

ORDER [GRANTING MOTION TO DISMISS].

AND NOW, to wit, this 11th day of June, A. D. 1956, after hearing the argument and considering the briefs submitted by the parties, it is ORDERED, ADJUDGED and DECREED that the motion to dismiss filed by the United States of America in each of the above entitled actions be and the same is hereby GRANTED.

/s/ J. WELSH,
J.

PLAINTIFFS' MOTION TO VACATE AND SET ASIDE JUDGMENT AND IN THE ALTERNATIVE REQUEST FOR CONCLUSIONS OF LAW.

TO THE HONORABLE JUDGE GEORGE A. WELSH:

The Plaintiffs, in the above action, respectfully move the Court to vacate and set aside the order and judgment of June 11, 1956, dismissing the Complaints entered in these actions for the following reasons:

1. That the Complaints on their face set forth a cause of action based on alleged negligence on the part of the United States Government.

2. The Complaints clearly set forth a triable issue of fact and the Motion to Dismiss should have been overruled and the Plaintiffs afforded an opportunity to present proof.

Order

REQUEST FOR CONCLUSIONS OF LAW.

In the alternative, the Plaintiffs, by their Attorneys, VINIKOOR AND CRIDEN, request the Court to make Conclusions of Law as a method of saving proper legal questions for review.

/s/ HOWARD L. CRIDEN,
VINIKOOR AND CRIDEN,
Attorneys for Plaintiffs.
By: HOWARD L. CRIDEN.

Dated: June 21, 1956.

ORDER.

AND NOW, to wit, this 20th day of July, 1956, the above entitled case having been argued on the pleadings of the Plaintiff and summary motion of Defendant and the court, after due deliberation, having granted the Defendant's motion to dismiss the Complaint,

AND NOW, after motion of VINIKOOR AND CRIDEN, Attorneys for Plaintiff, filed herein on the 21st of June, 1956, to vacate and set aside the order dismissing the Complaint, it is

ORDERED, ADJUDGED and DECREED that the motion to vacate and set aside the judgment is denied; even though the allegations as set forth in the Complaint are accepted as fact and true but the Court, nevertheless, concludes as a matter of law that these facts are insufficient to establish a case upon which the United States Government can be held liable.

.....

U. S. D. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 414

CATHERINE S. WEINSTEIN, Administratrix of the Estate of ALBERT WEINSTEIN, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA.

JOSEPH J. ALESSANDRINE,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MILFORD J. MEYER,
Market Street Bank Building,
Philadelphia, 7, Pennsylvania,
Attorney for Petitioners.

MARTIN VINIKOOR,
HOWARD L. CRIDEN,
505 Finance Building,
1420 South Penn Square,
Philadelphia 2, Pa.,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No.

CATHERINE S. WEINSTEIN, Administratrix of the Estate of ALBERT WEINSTEIN, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA.

JOSEPH J. ALESSANDRINE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, by their attorney, pray that writs of certiorari issue to review judgments entered in this case on May 3, 1957, by the United States Court of Appeals for the Third Circuit, affirming the judgments in favor of the defendant rendered June 12, 1956, by the United States

District Court for the Eastern District of Pennsylvania. (Petitioners join in this petition by reason of the fact that both judgments below involve identical facts and questions and were decided by the Court of Appeals in a single opinion.)

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 244 F. 2d 68 and is printed in Appendix "A" hereto. There was no opinion by the District Court.

JURISDICTION.

The judgments of the Court of Appeals were entered on May 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The time for filing this petition was extended to August 31, 1957, by order of Mr. Justice Brennan dated July 28, 1957.

QUESTIONS PRESENTED.

I. Is the decision of the court below in conflict with the decisions of the Supreme Court of Pennsylvania on the issue of whether or not a private person would be liable under the circumstances here alleged, so as to render the United States liable under the Tort Claims Act?

II. Does the opinion of the court below constitute an unwarranted extension of the doctrine of *Dalehite v. United States* in holding that the United States is not responsible

for the negligence of its servants and agents even on the lowest operational level because of the "discretionary function" exception in the Tort Claims Act?

III. Does the opinion of the court below conflict with letter and spirit of this Court's decisions since *Dalehite* as to the extent of the liability of the United States under the Tort Claims Act?

STATUTES INVOLVED.

The pertinent provisions of the Federal Tort Claims Act of 1946, 60 Stat. 843, as amended, 28 U. S. C. 1346 (b), 2680 (a) et seq.; the Internal Revenue Code of 1954, 68 A. Stat. 3, 26 U. S. C. 5241, 5305; the Code of Federal Regulations, Part 182, Industrial Alcohol, 26 CFR 182.1 et seq., are printed in Appendix "B".

STATEMENT OF FACTS.

On May 26, 1955, an explosion occurred at the Publicker Industries, Inc. bonded warehouse and distillery plant located at Delaware Avenue and Bigler Street in Philadelphia, Pennsylvania. Three Publicker employees and one United States Government Alcohol Tax Unit employee were killed and five Publicker employees were seriously injured. Catherine S. Weinstein, Administratrix of the Estate of Albert Weinstein, Deceased, commenced her action for the death of her decedent, and Joseph J. Alessandrine commenced his action for damages for his injuries, under the Tort Claims Act against the United States. The amended complaint in each case makes precisely the same allegations, except as to damages; the two cases were

argued and disposed of together by the District Court and the Court of Appeals and petitioners join in this petition.

Petitioners amended complaints alleged that prior to and on the date of the explosion, the United States "supervised and controlled the building" in which the explosion occurred (para. 5, p. 4 a); that the death and injury were "proximately caused and brought about by the negligence and wrongful acts and conduct both of omission and commission on the parts of the Defendant, its agents, servants, employees, operators, and other personnel acting within the scope of their employment, under circumstances where the United States, if a private person, would be liable under the law of the place where such wrongful acts and omissions occurred. Plaintiff charges a large number of Defendant's negligent and wrongful acts and omissions as hereinafter more particularly set forth, continued, occurred, singly and in sequence within the Eastern District of Pennsylvania" (para. 4, p. 3 a); that in the said building there was "a large accumulation of fumes and vapors, the quality and characteristics of which the defendant knew or should have known by the exercise of reasonable diligence to be highly and inherently dangerous to persons working in and about the building" (para. 6, p 4 a); that the defendant was negligent "in failing to take proper precautions for the protection of employees working in and about" the building (para. 7, p. 4 a); that the defendant failed to "exercise that degree of care commensurate with the risk of danger arising from and reasonably to be expected to arise from the large accumulation of vapors of a highly and inherently dangerous inflammable nature which were contained in a congested area midst chemicals reasonably to be expected to be found in an alcoholic denaturing plant and bonded warehouse" (para. 8c, pp. 4, 5 a). The complaint also alleged that the defendant caused the building to be locked during certain periods (para. 5, p. 4 a); that the locking of the building created a dangerous condition (para. 6, p 4 a); that the United States was negli-

gent in failing to require and promulgate orders and regulations relating to proper ventilation (para. 8a, P. 4 a); to issue specific and direct detailed instructions relating to safety (para. 8d, P. 5 a) and to require under its regulatory powers that the building be so maintained as to secure the highest degree of ventilation (para. 9, P. 5 a). The amended complaints contained the further allegation that "plaintiff informs defendant that she will not be confined to the specific negligence and wrongful acts and omissions hereinbefore specified but expects to rely additionally and independently upon the general allegations of wrong, fault, negligence, tortious acts and conduct of the defendant" (para. 10, P. 5 a).

Defendant filed a motion to dismiss and an alternative motion for a more specific pleading. The District Court, Welsh, D. J., granted the motion to dismiss and, subsequently, denied plaintiff's motion to vacate and set aside the dismissal order. The Court of Appeals affirmed on two grounds: (1) that under the facts set forth in the amended complaint the United States owed no duty to the employees of Publicker; and (2) that the acts of negligence alleged were within the "discretionary function" exception of the Tort Claims Act, upon which Act (28 U. S. C. 2680(a)) Federal jurisdiction is based.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF PENNSYLVANIA ON THE ISSUE OF WHETHER OR NOT A PRIVATE PERSON WOULD BE LIABLE UNDER THE CIRCUMSTANCES HERE ALLEGED.

The Tort Claims Act (28 U. S. C. 2674) provides that the United States shall be liable "in the same manner and to

the same extent as a private individual under like circumstances". The amended complaints allege that the United States "supervised and controlled the building" and that its negligence caused the explosion and consequent damage. The Court of Appeals took the position that this allegation was not sufficient to impose liability because "not only was there no occupancy by the defendant, but * * * the building where the explosion occurred was owned and occupied by Publicker Industries, Inc., in its bonded warehouse and distillery business" (244 F. 2d, at 60; [illegible]). In this holding the decision of the Court of Appeals is in direct conflict with the law of Pennsylvania. It has been consistently held that ownership and occupancy of the premises involved is not an essential element to impose upon the defendant the liability of a possessor and, secondly, that there may be possession and control of a building or instrumentality jointly by two persons each of whom may be jointly and severally liable for injuries incurred thereon.

In *Bollin v. Elevator Construction and Repair Company*, 361 Pa. 7, 63 A. 2d 19, an action was brought by an elevator operator employed by the owner of the building against an elevator repair company. The insurance company which had voluntarily assumed the duty to inspect the elevators was joined as an additional defendant. The trial court dismissed the insurance company as a party, but the Supreme Court reversed, holding "it is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common law obligations to use *that which he controls* so as not to injure another" (361 Pa., at 15, 63 A. 2d, at 22). In [illegible]*itting v. Wolfe*, 368 Pa. 167, 82 A. 2d 21, a contractor working on premises not owned by it was held liable for injuries suffered by the employee of another on the premises by reason of the fact that it had taken over supervision and control of the portion of the building in which the accident occurred.

There has never been in Pennsylvania any requirement of occupancy by the defendant as distinguished from super-

vision and control in order to impose tort liability. And we conceive this rule to be in keeping with the general law. This Court pointed out that it was the Government's "direction and control" of the fire suppression activities present in the case which imposed liability in *Rayonier Incorporated v. United States*, 352 U. S. 315.

The fact that the building in question was owned by and occupied by Publicker does not nullify the plaintiffs' allegation that the United States "supervised and controlled" the same. From the facts pleaded and admitted at this posture of the case, the petitioners are entitled to prove either that the defendant controlled the building despite Publicker's ownership and occupation or that the defendant controlled it jointly with Publicker. Under Pennsylvania law, joint tort feasors are jointly and severally liable; *Moraski v. Phila. Rapid Transit Co.*, 293 Pa. 224, 229, 142 A. 276, and cases cited therein. Cf. *Smith v. Lit Brothers*, 174 Pa. Super. 102, 100 A. 2d 390; *Bisson v. John B. Kelly, Inc.*, 314 Pa. 99, 170 A. 139.

The Government's liability is the same as that of a private person under the same circumstances. Under the averments of the Complaints the United States was in no different position here than a mortgagee or factor who maintained supervision and control of the operations of the owner in order to insure the safety of its investment. If an employee of the owner had been injured by reason of the negligence of an agent of the mortgagee or factor, there could exist no doubt of the latter's liability.

The Court of Appeals makes the specious argument (244 F. 2d at 70) that, since government inspectors were business invitees upon the Publicker premises (citing a wealth of authority for this horn-book proposition), the United States cannot be said to have supervised and controlled the operations therein. Admitting the inspectors were business invitees of Publicker and that that company owed them duties commensurate with this relationship, it does not follow that the United States may not have supervised

and controlled the operations so as to render itself liable to Publicker's employees for its negligence. And this is the averment of the Complaints.

The obligation of due care owed by Publicker to employees of the United States does not nullify the reciprocal duty of the United States to Publicker employees: *Turner v. Robbins*, 276 Pa. 319, 120 A. 274. If the conclusion of the Court below were correct, liability could not have been imposed in *Bollin* or *Bitting*, supra, for the elevator inspectors and contractors were certainly business invitees of the employers when on the premises. Cf. *Duffy v. Peterson*, 383 Pa. 420, 119 A. 2d 209; *Duffy v. Fischbach and Moore*, 386 Pa. 533, 126 A. 2d 413.

II.

THE DECISION BELOW CONSTITUTES AN UNWARRANTED EXTENSION OF THE DOCTRINE OF DALEHITE v. UNITED STATES IN HOLDING THAT THE UNITED STATES IS NOT RESPONSIBLE FOR THE NEGLIGENCE OF ITS SERVANTS AND AGENTS EVEN ON THE LOWEST OPERATIONAL LEVEL BECAUSE OF THE "DISCRETIONARY FUNCTION" EXCEPTION IN THE TORT CLAIMS ACT.

The liability of the United States under the Tort Claims Act is expressly limited in certain respects and does not apply to (28 U. S. C. 2680):

> (a) "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused."

In *Dalehite v. United States*, 346 U. S. 15, a majority of the Justices of this Court participating in the decision (Justice Reed, Chief Justice Vinson, Justices Burton and Minton) held that this exception relieved the United States of liability for an explosion which was alleged to have occurred by reason of its failure to promulgate proper rules and regulations for the storage or loading of fertilizer. The majority opinion makes it clear that although the exception extends to all employees exercising discretion, it is limited entirely to matters of discretion and cannot be extended to acts of commission or omission by employees where discretion is not involved. The cornerstone of the decision is the statement of the Court (346 U. S. at 23) that "Since no individual acts of negligence could be shown the suits for damages * * * necessarily predicated government liability on the participation of the United States in the manufacture and the transportation of FGAN." As explained in its review of the legislative history of the exception (footnote 21, 346 U. S. at 29) it was "intended to preclude any possibility * * * (of liability) growing out of an authorized activity * * * where no negligence on the part of any government agent is shown * * * (or) based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved * * * However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of non-regulatory agencies." In refusing to define the limits of discretion under the Act, the Court said (346 U. S. 36): "Where there is room for policy judgment and decision there is discretion." The definitive holding of the decision is (346 U. S. 42): "The decisions held culpable (by the Court of Appeals) were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

Within the language of the decision, then, it must be assumed that the converse of its limitation is equally true, that where there is no room for policy judgment and discretion there is no room for decision and no exemption of liability. Nowhere in the record of the instant case does it appear that the only acts of negligence complained of lie within the realm of "policy judgment and discretion." The court below has completely disregarded the allegations of the amended complaints that the United States through its employees, with knowledge of the existence of a highly dangerous condition, failed to "exercise that degree of care commensurate with the risk of danger arising from and reasonably to be expected to arise" from the same (para. 8c, P.4 a) and that it failed "to take proper precautions for the protection of employees working in and about" the building (para. 7, P.4 a). Assuming the correctness of its holding that the allegations of negligence based upon the failure to promulgate regulations (para. 8a, P.4 a) and in promulgating improper regulations (para. 9, P.5 a), there is no justification at this stage of the proceedings for the elimination of the remaining allegations of negligence which do not deal with any matter of discretion on any level. Especially is this true in view of the allegation of paragraph 10 of the amended complaints specifically averring reliance upon the general allegations of negligence (para. 10, P.5 a).

It seems perfectly obvious that had the complaints alleged that a specific employee of the United States, with knowledge of the existing dangerous condition, had committed a specific act of negligence which caused the explosion, the complaints would have been sufficient even though the work of that employee was being done pursuant to general regulations, the adoption of which was discretionary. Since the Federal Rules of Procedure do not require any more specific allegations of negligence, how can *Dalehite* be relied upon in the justification for striking down these complaints? If a Government inspector negli-

gently used a gauge, opened a pet-cock or dropped a measuring rod and caused the explosion, could there be any doubt of the liability of the defendant? If liability will necessarily flow from such an act of commission, by what construction of the language of the Act may liability be denied if it follows from an act of omission of the same employee acting in the course of the same employment?

The error of the court below upon the facts of this case points up the concise appraisal of the minority opinion in *Dalehite* (Justices Jackson, Black and Frankfurter; Justices Douglas and Clark took no part):

> "The common sense of this matter is that a policy adopted in the exercise of immune discretion was carried out carelessly by those in charge of detail" (346 U. S. at 58).

III.

THE DECISION BELOW CONFLICTS WITH THE LETTER AND SPIRIT OF THIS COURT'S DECISIONS SINCE DALEHITE.

In its consideration of the Tort Claims Act since *Dalehite* this Court has taken a consistent position delimiting the exceptions to liability contained in the Act and extending the impact of the Act to every reasonably applicable set of circumstances.

In *Indian Towing Company v. United States*, 350 U. S. 61, *Dalehite* was used as the basis for argument that the United States was not liable for negligence in the operation of a lighthouse. Refusing to extend the exemption, this Court pointedly said (350 U. S. at 67, 69):

> "The question is one of liability for negligence at what this Court has characterized the 'operational level' of governmental activity. * * * The Coast Guard

> need not undertake the lighthouse service. But once it exercised its discretion to operate a light * * * it was obligated to use due care to make certain that the light was kept in good working order, and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning."

That this decision strictly delimits the *Dalehite* case has been made clear. In *Rayonier Inc. v. United States*, 352 U. S. 315, this Court said: "To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*". The weight of opinion in the Court of Appeals confirms this analysis: *Fair v. United States*, 234 F. 2d 288; *Dahlstrom v. United States*, 228 F. 2d 819.

In *Hatahley v. United States*, 351 U. S. 173, the Government had been exonerated from liability for the acts of its agents in confiscating horses belonging to Navajo Indians. Reversing, this Court said (351 U. S. 181):

> "These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act."

The affirmance by this Court (350 U. S. 907, 76 S. Ct. 192, 100 L. ed. 796), without opinion, of the Court of Appeals decision in *United States v. Union Trust Co.*, 221 F. 2d 62, points out that a clear distinction is to be drawn between "nonactionable planning and actionable negligence in carrying out the plan" (221 F. 2d at 77). The Court of Appeals there said:

> "So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

So it is here, the inspectors and gaugers employed at the Publicker plant had no discretion to supervise and control the plant in such negligent manner as to cause an explosion to take place.

Few cases under the Tort Claims Act have been dismissed without full development of the facts by the taking of evidence. Construing the language of these complaints in the most narrow sense against the pleader is an unjustifiable approach. It is well established that a complaint should not be dismissed "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim": 2 *Moore's Federal Practice*, Sec. 12.08.

CONCLUSION.

The facts set forth in the Amended Complaints are admitted to be true upon defendant's motion to dismiss. Those facts spell out a clear case of liability of the United States if it were a private individual. The negligence complained of, in part at least, is that of agents of the Government at an operational level exercising no discretion whatsoever.

The judgments should be reversed and remanded for trial.

Respectfully submitted,

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APPENDIX "A".

OPINION OF THE COURT BELOW.

(Filed May 3, 1957.)

By McLAUGHLIN, *Circuit Judge.*

These damage suits were brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346, 2674, 2680. Appellant Weinstein's decedent and appellant Alessandrine were employees of Publicker Industries, Inc. at the latter's alcohol denaturing plant and bonded warehouse, Philadelphia, Pennsylvania. On May 26, 1955, there was an explosion and fire at that place as a result of which Albert Weinstein was killed and Alessandrine injured. The claims arising from those casualties were dismissed as not stating causes of action.

Concededly the asserted liability against the government is solely predicated upon the Internal Revenue Code and regulations. The complaints do not allege occupancy of the premises by the government but say that within the scope of their employment, its employees "supervised and controlled the building" and by reason of causing the building to be locked during certain hours without proper precautions created a highly dangerous condition through the accumulation of fumes, etc. This is not stated to have caused the explosion and fire but appellants do charge that these were "proximately caused and brought about by the negligence and wrongful acts and conduct both of omission and commission on the part of Defendant, its agents * * * within the scope of their employment, under circumstances where the United States, if a private person would be liable * * *."

Not only was there no occupancy by the defendant but the only reasonable inference from the amended complaints and statement on behalf of appellants is that the building

where the explosion occurred was owned and occupied by Publicker Industries, Inc. in its bonded warehouse and distillery business. Government inspectors were on the premises under the basic authority of 26 U. S. C. 5305. This directs the Secretary of the Treasury or his delegate to issue regulations respecting the establishment, bonding and operation of authorized industrial alcohol plants, denaturing plants, and bonded warehouses and the distribution, sale, export and use of alcohol to secure the revenue, to prevent diversion of the alcohol to illegal uses and to obtain the highest possible efficiency in the nonbeverage and allied alcohol industries "consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products."[1]

There are various regulations under the above section of the Code the fundamental purpose of which is to enable the government through its agents to fully check the alcohol involved in order that the proper revenue be collected. Section 26 C.F.R., 1955 Supp., Section 182.1, et seq. In line with this certain aspects of construction and equipment are covered but these can be varied under Section 182.103 where applicants show that proposed changes "will afford as much security and protection as the construction and equipment prescribed." This among other things applies

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[1] 26 U. S. C. 5305 reads in full:

"The Secretary or his delegate shall issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized by this subchapter, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose on the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products."

to ventilation, the need for which is recognized in Sections 182.41, 182.49. Beyond doubt the regulations contemplate that such plants afford ample opportunity for strict scrutiny and supervision by the government but those measures in no way contemplate the government taking over the business. They are merely to fully protect its tax revenue emanating from alcohol. Producing and storing alcohol are carefully regulated activities primarily because alcohol is a highly remunerative source of tax income. However, within the limits of those revenue restrictions owners and operators of that type of undertaking run their own shows as far as the authority of the Code is concerned. There is not the slightest hint that under the Code there exists a permissible inference that the government was possessor or occupant of the Publicker premises, or was there engaged in manufacturing alcohol or operating a bonded warehouse. Publicker, as the owner and operator of the building and business, has no reason in the Code or regulations for functioning under dangerous circumstances. Section 5305 and the regulations contain no excuse for the creation of such conditions or the sanctioning of them, nor any indication that the shifting of Publicker's obligation over to the government would be countenanced. In United States v. Witten, 143 U. S. 76, 79 (1892), distilled spirits were stolen from a bonded warehouse. Relief from taxes on these was sought on the proposition the government agents had been negligent in security measures. The Court held: "The only duty which the revenue officers owed in regard to the security of the warehouse and safekeeping of the spirits therein, was to the government, and not to the defendants; and any negligence of those officers gave the defendants no rights against the government * * *." That exact principle, absolving the government from a duty to protect the warehouseman's property would also have applied if an employee of the warehouse had been killed in the course of the robbery. In turn it follows that there is absence of responsibility on

the part of this appellee for the death and injury of Messrs. Weinstein and Alessandrine, employees of the operating owner and on duty for it at the time of the accident.

The government inspectors in and about the building where the explosion occurred admittedly were present under the Internal Revenue Code. It was because they were there and were satisfied the regulations were being obeyed that the plant was in production. Under these circumstances as was held in Anderson & Nelson Distilleries Co. v. Hair, 103 Ky. 196, 44 S. W. 658, 659 (1898), "Without his (the government inspector) presence the distillery could not run. It must therefore be held that appellee was at appellant's distillery at the implied invitation of appellant and not [as] a mere licensee."[2] Restatement of Torts, Section 345, Com. d, says that "When the presence of an inspector or other official on the land is necessary to the possessor's lawful conduct of his business, the official is a business visitor of the possessor." The basic allegations of appellants' claims cannot be validly distinguished from this principle. Under it appellee's agents were business visitors representing their government which had no duty to plant employees arising out of the Publicker operation and no responsibility for their injuries and death in the course thereof.

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[2] For some examples of other decisions holding that public officers or inspectors who enter another's premises in the performance of their public duties are business visitors under a legal privilege see: Massey v. J. H. McGraw & Co., 233 F. 2d 905 (6 Cir. 1956) (United States inspector of construction work); Cudahy Packing Co. v. McBride, 92 F. 2d 737 (8 Cir. 1937) (United States meat inspector); Wilson v. Union Iron Works Drydock Co., 140 P. 250 (1914) (United States customs inspector); Low v. Grand Trunk Railway Co., 72 Me. 313 (1881) (United States customs inspector); Miller v. Pacific Constructors, 157 P. 2d 57 (1945) (United States Bureau of Reclamation inspector); Mitchell v. Barton & Co., 217 P. 993 (1923) (United States sanitary inspector); Howland v. Morris, 196 So. 472 (1940) (city building inspector); Pickwick v. McCauliff, 78 N. E. 730 (1906) (municipal construction inspector); Robey v. Keller, 114 F. 2d 790 (4 Cir. 1940) (city library construction inspector).

The appellants' remaining argument is that they were entitled to submit proofs under the Tort Claims Act. The allegations of the complaints are as we have seen. They state "* * * that the prohibited hours of operation and locked building enforced by the Defendant without proper precautions, warning and regulations, created a highly dangerous condition, * * *" and that it "* * * was negligent in failing to take proper precautions for the protection of employees working in and about Building #160." The first theory attacks the existent regulations and the second asserts that there should have been more and better regulations. These contentions are specifically eliminated from the scope of the Tort Claims Act by (a) of the Exceptions to the Act, 28 U. S. C. 2680 which reads:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Both of the charges arise squarely under the above exception. They are wholly based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the government. The first deals with the locking of the building itself which was in accordance with regulations under Section 5305 of the Code and the second cites failure to promulgate further regulations for the protection of persons employed in the building. Appellants' idea seems to be that at the trial of this case the complete Internal Revenue Code and regulations would be introduced or at least everything relevant to the supervision of the production and distribution of

alcohol; all this in the hope that some regulation might be found which would be of assistance to their averment of government negligence. But even if some apparently helpful language were revealed it would still be within (a) of the Exceptions for it necessarily would derive directly from the Internal Revenue Code and regulations.

The legislative history of the Tort Claims Act clearly reveals that the revision of the discretionary exception as it had first appeared in the then bill was "designed to preclude * * * application of the act to a claim against a regulatory agency * * *. Since the language used * * * exempts from the act claims against federal agencies growing out of their regulatory activities it is not necessary expressly to except such agencies * * * by name * * *."[3] It is well settled that "discretionary function" embraces regulation. Dalehite v. United States, 346 U. S. 15, f.n. 21, p. 29, 34 (1953); Coates v. United States, 181 F. 2d 816, 818 (8 Cir. 1950). The Dalehite case revolved around a Coast Guard regulation of shipboard loading of cargo. Other decisions where the discretionary exception of the Act was held to bar claims based upon governmental regulations are Schmidt v. United States, 198 F. 2d 32 (7 Cir. 1952), cert. den. 344 U. S. 896 (1952); Matveychuk v. United States, 195 F. 2d 613 (2 Cir. 1952), cert. den. 344 U. S. 845 (1952); Chournos v. United States, 193 F. 2d 321 (10 Cir. 1951), cert. den. 343 U. S. 977 (1952); Powell v. United States, 233 F. 2d 851 (10 Cir. 1956).

The Dalehite opinion governs this phase of the case. Under it the taxwise regulation of the Publicker plant was a discretionary function barred by Exception (a) from the operation of the Tort Claims Act.[4] Those were the facts

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[3] Memorandum for the Use of the Committee on the Judiciary, H. of Rep., 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373 (Jan. 1942), p. 8.

[4] The government also urges that the claims are prohibited by reason of Exceptions (c) and (i) to the Tort Claims Act. These read:

presented by the complaints and by reason of them the defendant was entitled to their dismissal on that ground also. The judgments of the district court are affirmed.

APPENDIX "B".

UNITED STATES GOVERNMENT STATUTES AND REGULATIONS.

28 U. S. C. 1346

UNITED STATES AS DEFENDANT

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, The United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

* * *

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system."

In view of our above holding that Exception (a) applies we do not pass upon these at this time.

28 U. S. C. 2680

EXCEPTIONS

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

26 U. S. C. 5241

SUPERVISION OF OPERATIONS

(a) Maintenance and Supervision.—The maintenance and supervision of internal revenue bonded warehouses shall be under such regulations as the Secretary or his delegate may prescribe.

(b) Assignment of Gaugers.—Storekeeper-gaugers shall be assigned by the Secretary or his delegate, and shall be in the joint custody of the storekeeper-gauger or such other officer and the proprietor thereof, and kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper-gauger or other person who may be designated to act for him.

26 U. S. C. 5305

REGULATIONS FOR ESTABLISHING, BONDING AND OPERATION OF PLANTS AND WAREHOUSES

The Secretary or his delegate shall issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized by this sub-chapter, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the non-beverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose on the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

The pertinent regulations are found in 26 C. F. R. (1954) Parts 182. (Approved December 28, 1954; 19 F. R. 9438, December 31, 1954; effective January 1, 1955. Codified in Title 26, Code of Federal Regulations (1954), Part 182, Industrial Alcohol.)

26 CFR 182.280

DISCONTINUANCE BY DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION

(a) *Bonded warehouse.* Whenever, in the opinion of the Director, Alcohol and Tobacco Tax Division, any industrial alcohol bonded warehouse is unsafe or unfit for use,

or the alcohol therein is liable to loss or great wastage, he may discontinue such warehouse and require the alcohol therein to be transferred to such other warehouse or to a denaturing plant as he may designate, and within such time as he may prescribe. Such transfer shall be made under the supervision of the assistant regional commissioner, or of such other officer as may be designated by the Director, Alcohol and Tobacco Tax Division, and the expense thereof shall be paid by the owner of the alcohol * * *

(b) *Denaturing plant.* The Director, Alcohol and Tobacco Tax Division may likewise discontinue any denaturing plant where operations have been suspended for a period of six month, or where the alcohol and denatured alcohol stored therein are liable to loss or great wastage. When a denaturing plant is so discontinued, the proprietor shall transfer the alcohol and denatured alcohol stored therein to another denaturing plant or, in the case of denatured alcohol, to a qualified dealer (68 A. Stat. 649, 867; 26 U. S. C. (I. R. C.) 5252, 7302).

26 CFR 182.334

SUPERVISION OF OPERATIONS

The storekeeper-gauger will have supervision of the industrial alcohol plant to which he is assigned, under the direction of the assistant regional commissioner. The storekeeper-gauger will see that the operations of the industrial alcohol plant conform to the requirements of the law and the regulations in this part and will, in the course of his daily duties, carefully observe the character and condition of all connections, pipes, tanks, vessels, stills, and other equipment used for conveying alcohol in the course of distillation to see if they are continuous and closed as required and whether access can be gained to the alcohol

in the storekkeeper-gauger's absence. The storekeeper-gauger will promptly report to the assistant regional commissioner any industrial alcohol plant operations or condition of apparatus and equipment not conforming to the law and regulations.

26 CFR 182.470

CONTROL OF WAREHOUSE

Every industrial alcohol bonded warehouse established pursuant to the provisions of law and of the regulations in this part shall be under the control of the assistant regional commissioner of the region in which the warehouse is located.

26 CFR 182.473

CUSTODY OF WAREHOUSE

The bonded warehouse shall be in the charge of the storekeeper-gauger and shall be in the joint custody of the storekeeper-gauger and the proprietor thereof and kept securely locked and shall at no time be unlocked or opened or remain open, except in the presence of the storekeeper-gauger or other person who may be designated to act for him. The keys to all Government locks shall remain at all times in the custody of the storekeeper-gauger, except that where no storekeeper-gauger is regularly assigned to the warehouse such keys shall remain in the custody of the storekeeper-gauger at the industrial alcohol plant or having charge of the warehouse or in the custody of the assistant regional commissioner or other person designated by him. The storekeeper-gauger having custody of the keys will not at any time permit them to go into the possession of any other person, except the assistant regional commissioner or an

officer authorized by the assistant regional commissioner or the Director, Alcohol and Tobacco Tax Division to receive them.

26 CFR 182.476

SUPERVISION OF OPERATIONS

The storekeeper-gauger will have charge of the bonded warehouse to which he is assigned, under the direction of the assistant regional commissioner. The storekeeper-gauger will see that the operations conform to the requirements of the law and the regulations in this part, and will, in the course of his daily duties, carefully observe the character and condition of all connections, pipes, tanks, or vessels used for conveying alcohol to see if they are closed as required, and whether access can be gained to the alcohol in the storekeeper-gauger's absence. The storekeeper-gauger will promptly report to the assistant regional commissioner any operations or condition of apparatus and equipment not conforming to the regulations in this part.

26 CFR 182.683

OPERATION OF INDUSTRIAL ALCOHOL DENATURING PLANTS

(w) Each denaturing plant shall be used solely for the purpose set forth in this part and shall be under the control of the assistant regional commissioner of the region. The buildings shall be kept closed and the doors securely locked except when work incidental to the operations of the plant is being carried on. The proprietor may, in connection with the storekeeper-gauger, except as provided in section 5313 (b), I.R.C., refuse admittance to any person not an internal revenue officer.

26 CFR 182.947

FREQUENCY OF INSPECTIONS

Assistant regional commissioner will cause the premises of permittees to be inspected at irregular and unexpected intervals in accordance with the prevailing inspection policy as determined by the Director, Alcohol and Tobacco Tax Division from time to time.

26 CFR 182.951

EXAMINATION OF DISTILLING EQUIPMENT

The inspectors will ascertain whether the distilling equipment in industrial alcohol plants conforms to the plans and will trace the equipment, including pipelines, to determine whether the flow of alcohol is continuous, and whether the alcohol is properly protected against diversion by adequate sealing and locking of the equipment. The inspectors will require correction of any unsafe condition discovered.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 414

CATHERINE S. WEINSTEIN, ADMX., ETC., PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH J. ALESSANDRINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 244 F. 2d 68.

JURISDICTION

The judgments of the Court of Appeals were entered on May 3, 1957. On July 28, 1957, Mr. Justice Brennan extended the time within which to file a petition to and including August 31, 1957. The petition was filed on August 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the adoption and enforcement of revenue regulations requiring the closing of the buildings, or the failure, either by regulation or order, to require ventilation fall within exceptions to the Tort Claims Act.

2. Whether the authority granted the Secretary of the Treasury over alcohol plants and warehouses imposed a duty cognizable under the Tort Claims Act to provide for the safety of the plant's employees.

STATUTES INVOLVED

1. Section 5305 of the Internal Revenue Code of 1954 provides:

> The Secretary or his delegate shall issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized by this subchapter, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose on the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

2. 28 U. S. C. 1346 (b) provides:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. 28 U. S. C. 2680 provides in pertinent part:

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs

duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

* * * * *

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

* * * * *

STATEMENT

Section 5305 of the Internal Revenue Code of 1954 (*supra*, p. 2) directs the Secretary of the Treasury to issue regulations respecting the operation of industrial alcohol plants and bonded warehouses to secure the revenue, and to prevent the diversion of alcohol to illegal uses. Acting under this authority, the Secretary of the Treasury has issued detailed regulations which are published in 26 CFR, Part 182.

These regulations provide among other things that industrial alcohol bonded warehouses and denaturing plants shall be under the control of the assistant regional commissioner (26 CFR 182.470, 182.683). *Warehouses* are to be locked with Government locks at all times except when alcohol is being entered into, or removed from them, or when the proprietor needs to have access for the purpose of making repairs or for some other legitimate purpose (26 CFR 182.41, 182.474, 182.475). *Denaturing plants* are to "be kept closed and the doors securely locked except when work incidental to the operations of the plant is being carried on" (26 CFR 182.683). The regulations permit openings in the outside of the wall, roof, and floors of

industrial alcohol plants for ventilation and heating purposes, provided such openings are protected by gratings or bars (26 CFR 182.24).

Albert Weinstein and Joseph J. Alessandrine were employed by Publicker Industries, Inc., which operates an industrial alcohol denaturing plant and bonded warehouse in Philadelphia, Pennsylvania. On May 26, 1955, at about 8:15 a. m., an explosion occurred in Building No. 160 of Publicker Industries in which the denaturing plant and bonded warehouse were located (Pet. 3). The explosion killed an officer of the Internal Revenue Service and three employees of Publicker Industries including Albert Weinstein. A number of Publicker employees, including petitioner Alessandrine, were injured.

The amended complaints (App. 3a–7a)[1] allege that Weinstein was killed, and Alessandrine was injured, as the result of the negligence and wrongful acts and conduct of the United States and its agents acting within the scope of their employment "as hereinafter more particularly set forth" (Par. 4, App. 3a). In particularizing the basic charge of negligence, petitioner alleged that the United States supervised and controlled Building No. 160, requiring it to be locked from 4:30 p. m. to 8 a. m. (Par. 5, App. 4a);[2] that the closing of the building during those hours caused a large accumulation of explosive fumes, which, as the United States knew or should have known, was dan-

[1] App. refers to the Appendix to Appellants' (Petitioners here) brief in the Court of Appeals.

[2] *I. e.*, when the plant was not in operation, cf. 26 CFR 182.683, *supra*, p. 4.

gerous to the persons employed in the building (Par. 6, App. 4a); and that the United States was negligent in failing to take the proper precautions for the employees working in or about the building (Par. 7, App. 4a). Petitioners charge in particular that the United States negligently failed (Par. 8, App. 4a–5a):

> (a) to require and promulgate orders and regulations relating to proper ventilation air space and air circulation;
>
> (b) to post a watchman and guard;
>
> (c) to exercise the degree of care necessary in the circumstances;
>
> (d) to issue specific and detailed instructions to its employees relating to safety

and to require, under its regulatory powers, that the building be maintained so as to secure the highest degree of ventilation of air space and air circulation (Par. 9, App. 5a). Par. 10 (App. 5a) finally "notified" defendant that petitioners would not be confined to those specified acts of negligence but that they expected to rely additionally and independently upon the general allegations of negligence.

The United States moved to dismiss the amended complaint on the grounds that the complaint came within the exceptions of 28 U. S. C. 2680 (a), (c) and (i), that a private party would not be liable in the circumstances; that, if any duty was owed to petitioners, it was owed by Publicker Industries and not by the United States; and that petitioners were entitled to relief under the Pennsylvania Workmen's Compensation Statutes (App. 7a–8a). The District

Court granted this motion (App. 11a). A motion to vacate was denied (App. 12a).

The Court of Appeals affirmed the decision of the District Court (Pet. 14–20). It held that the nature of the Government's supervision and control under the Internal Revenue Code and the regulations was not such as to impose upon the Government the special duties and liability of a possessor of property, responsible for the safety of the occupants of the building. Apart from this ruling denying the existence of any tort liability, the Court of Appeals held that the complaints merely alleged inadequacies of the existing regulations, and failure to issue more and better regulations which came squarely within the two exceptions of 28 U. S. C. 2680 (a). The alleged negligence thus consisted either in acting in accordance with existing regulations, even though allegedly inadequate, or in the failure to promulgate further regulations, plainly a discretionary function (Pet. 18–20). The court left open the question whether liability was also barred under 28 U. S. C. 2680 (c) and (i) (Pet. 19–20, fn. 4).

ARGUMENT

1. Insofar as affirmative acts constitute the basis for liability asserted in the complaints, the sole facts alleged are the adoption and enforcement of regulations requiring the premises to be locked. This, allegedly, resulted in the accumulation of fumes and vapors dangerous to persons working in or about the buildings (App. 3a–5a). Wholly apart from whether the regulations in fact provide any basis for such an

allegation,[3] it is clear that Congress exempted the adoption and enforcement of regulations from the scope of the Tort Claims Act. However *Dalehite* v. *United States*, 346 U. S. 15, may have been modified by *Indian Towing Co.* v. *United States*, 350 U. S. 61, and *Rayonier, Inc.* v. *United States*, 352 U. S. 315, nothing has been suggested which would limit the holding that the exercise of the type of discretion involved in the issuance of official regulations does not give rise to liability. 346 U. S. at 43. On that issue, the dissent in *Dalehite* also does not disagree. 346 U. S. 57–58. With respect to the affirmative actions of government agents to enforce the regulations, the only allegation here is that they carried out the regulations as enacted. The complaints charge that employees of the United States "caused said building to be locked daily for a period commencing four thirty o'clock P. M. and eight o'clock A. M. of each day, during which time operations in the plant were prohibited." (App. 4a.) Such action falls within the exemption provided for acts "in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *." 28 U. S. C. 2680 (a). Here again the issue is not affected by *Indian Towing* and *Rayonier*, where the alleged negligent action was not action re-

[3] As pointed out above, the regulations do not prohibit the installation of appropriate vents for ventilation (*supra*, p 4). Moreover, if the owner determined that some of its employees should have access to the plant after hours in order to perform work necessary to proper ventilation, the regulations do not stand in the way since such operations would constitute "work incidental to the operation of the plant." See 26 C. F. R. 182.683, *supra*, p. 4.

quired by official regulation. To permit tort liability for actions by government employees required of them by regulation would result in testing the legality of rules and regulations through the medium of damage suits, a process which Congress clearly did not intend. See H. Rept. 1287, 79th Cong., 1st sess., pp. 5–6; H. Rept. 2245, 77th Cong., 2d sess., p. 10.

In addition to the exemption provided by 28 U. S. C. 2680 (a), the exemptions provided by subsections (c) and (i) of the same section specifically exclude these claims since they arise from the tax and fiscal functions of the treasury agents.

2. The question remains whether, assuming there is no liability for the affirmative acts of locking up the buildings, liability can be imposed by reason of the failure of the United States, either by regulation or by instructions or orders, to require ventilation to remove a dangerous condition. This also falls within the discretionary exemption, but, even more fundamentally, there would be no tort liability even against a private person for the failure to act since there was no duty to the persons involved to take action. Under the specific provisions of the Tort Claims Act, *supra*, p. 3, local tort law controls: in this case, Pennsylvania law. The Pennsylvania courts have stated that "It is fundamental that negligence and liability therefor cannot be predicated upon a state of facts which does not impose any legal duty." *Zayc, Admr.* v. *John Hancock Ins. Co.*, 338 Pa. 426, 430. See also *Stevens* v. *Reading St. Railway Co.*, 384 Pa. 390, 402. The function of the treasury agents on the premises was not to run the plant or to enforce safety regulations,

but to protect the revenue.[4] This was their sole function and, in carrying it out, they had no duty to act for the protection of the plant employees. As this Court said in *United States* v. *Witten*, 143 U. S. 76, 78–79:

> If he [the owner of the distillery] was not satisfied with the security of the warehouse, he had only to take any measure, consistent with the access and supervision of the revenue officers, to make it more secure, or else to pay the tax and remove the spirits. The only duty the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein was to the government, * * *.

If the function of the agents had been to enforce safety standards in an operation subject to government control, there might perhaps be some basis for drawing an analogy to the lighthouse operations of *Indian Towing* or the fire fighters of *Rayonier*. But here it is clear that no safety inspection was involved. In fact it is the failure to assume such a function that is the real basis for the complaint.[5] Therefore, under Pennsylvania law, there being no duty to take affirm-

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[4] The allegations in the complaints that agents of the United States "supervised and controlled the building" (App. 4a) must be read in the light of the admission that these agents were Treasury inspectors acting solely pursuant to the Internal Revenue Code (Pet. 14). Petitioners concede that they were business invitees (Pet. 7). Thus, they were not engaged in manufacturing alcohol, but in protecting the revenue with relation to Publicker's operation of its plant.

[5] *Cf. Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5) holding that the United States cannot be held "liable in tort for failure to provide adequate police protection within the domain of the state of Texas * * *."

ative action, there was no liability for a failure to act.

3. The petitioners complain that the court below gave too restricted an interpretation to the allegations of their complaints (Pet. 10–11). Their assertion appears to be that the language of their pleadings was sufficiently broad and indefinite to permit proof of acts of negligence not covered by the exceptions in the Tort Claims Act or of omissions to act with respect to matters as to which they had a duty to act. Admittedly the language of the complaints is far from precise (App. 3a–5a). However, on a fair reading of these paragraphs, we submit the courts below were entirely justified in their interpretation. Nor did the petitioners seek permission to amend their complaints further to allege additional facts as a basis for liability. In any event, whether or not the two courts were correct, the proper construction of these particular pleadings is not a question of general importance justifying review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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